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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. KIM McMURRAY, Defendant and Appellant.	B202504 (Los Angeles County Super. Ct. No. BA295500)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael M. Johnson, Judge. Affirmed.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie A. Miyoshi and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

After a first jury deadlocked 11-to-1 in favor of a guilty verdict, and a second jury deadlocked 8-to-4 in favor of a not guilty verdict, a third jury convicted Kim McMurray of second degree murder, with a finding that he personally used a deadly weapon, a knife, to commit the offense. McMurray thereafter admitted he had four prior convictions with a prison term, and the trial court sentenced him to an aggregate term of 20 years to life in state prison. We affirm.

FACTS[1]

The Crime

In April 2005, McMurray had been "bedding down" for about eight years in Pan Pacific Park adjacent to The Grove, a shopping, dining, and entertainment complex between First Street and Third Street, about one block east of Fairfax Avenue. At the same time, Eric Gelman (the victim) worked at a café in The Grove. Brian Malone (an eyewitness) lived in a second-story apartment on First Street, between Fairfax and Hayworth Avenue, west of The Grove, and John Cisneros worked and was living at a bagel shop north of Fairfax, in the same area.

On April 17, 2005, at some point in time after 8:00 p.m., McMurray showed up at the bagel shop where Cisneros worked and lived. Cisneros heard McMurray talking to James "Tiny" Gregory about "trying to get some credit or something like that, and it was denied . . . ." Cisneros could not hear the whole conversation exactly, but "[i]t was about some meth or something."

At 9:52 p.m., Gelman clocked out from his job in The Grove.

At about 10:00 p.m., Malone heard a "loud grunt" outside the front window of his apartment. When Malone looked out the window, he saw a Black male, standing about six feet one inch tall, facing another man (later identified as Gelman) who appeared to be "swaying in place." An instant after Malone first looked out his window, Gelman went

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1 Except where otherwise noted for context, the facts are summarized from the evidence presented at McMurray's third trial in August and September 2007.

to the ground, and the Black male who had been facing him started running east down First Street, and then north, into an alley about a half block away.

Malone yelled down to Gelman, asking whether he was okay, but got no response. Malone then grabbed his cell phone, and went outside to help. When he got to Gelman, Malone saw a crumpled newspaper stuffed around Gelman's neck area inside his hooded sweatshirt and saw blood running down the front of his head. Malone called 911, and paramedics told him to find the source of the bleeding and to apply direct pressure to the wound until they arrived. When Malone pulled the newspaper away, he saw a large knife sticking in Gelman's neck. By the time paramedics arrived at the scene, Gelman was already clinically dead with no heartbeat.[2]

Meanwhile, about 45 minutes after McMurray left the bagel shop where Cisneros worked and lived, Cisneros heard a loud noise at the back door. "[I]t was like a hard bang, [and someone was] screaming and yelling, like, 'Hey, Tiny, let me in. I need to talk to you. Can I come in?' " When Cisneros opened the back door, he saw that it was McMurray. Cisneros asked what he wanted, and McMurray answered, "That mother-fucker shouldn't have made me do it. All I asked him for was some change, whatever, for washing his car. He was supposed to give me some money. . . . Let me come in real quick just to change some clothes real quick or whatever." McMurray was carrying a white bag with blood on it, and Cisneros asked what had happened. McMurray said, "I don't know. For all I know I might have killed him. I stabbed him seven or eight times." At that point, "Tiny" talked to McMurray for a moment, and then slammed the door. About 20 minutes after McMurray left the bagel shop, Cisneros saw paramedics and police "over the person that was laying . . . in the grass . . . by the apartment complex, maybe about ten feet before . . . Hayworth [Avenue] on the sidewalk."

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[2] An ensuing autopsy established that Gelman died from a stab wound caused by a knife that entered his upper back just below the neck in a downward trajectory. The wound went through bone in Gelman's spinal column, and through his trachea and aorta, and he had essentially drowned in his own blood.

The Investigation

The Crime Scene

Los Angeles Police Department (LAPD) Detective Mark Holguin investigated the Gelman murder. On the night of the murder, Detective Holguin responded to the crime scene, and recovered the knife which paramedics removed from Gelman's neck. While at the scene, Holguin received information that the assailant had run into a nearby alley, and he walked to the alley in an attempt to find any blood trail. About 10 to 20 feet into the alley, Detective Holguin recovered a $1 bill. A K-9 unit was called to track scent from the dollar bill, and led the handler through nearby alleys to an area past a bagel shop sign and then to a gas station. Holguin observed the crumpled, bloody newspaper at the crime scene — the knife that he recovered was lying on top of the newspaper — but he neglected to recover that item of evidence. Holguin identified Gelman from his driver's license, and, using a car alarm remote recovered from his pocket, found his car parked near the crime scene. Holguin found a baggie of marijuana on the front seat of Gelman's car.

The Sketch

On April 19, 2005, eyewitness Malone met with a police artist who prepared a sketch of the assailant. The completed sketch was circulated within the police department in an internal crime alert.

Initial Interviews With McMurray

LAPD Officer Teodoro Urena also worked the Gelman murder investigation. On April 19, 2005 (two days after the murder), bicycle officers advised Urena that "they had come across a person" with information concerning the Gelman murder. The bicycle officers directed Urena to John Hambrick, who, in turn, told Urena to talk to McMurray.[3]

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[3] Hambrick testified as a defense alibi witness at McMurray's third trial. According to Hambrick, he had been with McMurray in Pan Pacific Park for about 30 to 45 minutes, and then, when he (Hambrick) had "just left" McMurray, "helicopters were everywhere [going] after the murderer."

After talking to Hambrick, Officer Urena spoke to McMurray, who said he did have some information, but "didn't want to talk about it out in public." McMurray did say, however, that he "had received information that the murder was over a bad dope deal." At that time, the information about the marijuana found in Gelman's car had not been made public because the police believed it might be something that only the killer would know. McMurray agreed to be transported to the police station to be interviewed by Urena and Detective Holguin.

During the interview on April 19, 2005, McMurray told the officers that he had been "bedding down" in Pan Pacific Park "on-and-off" for eight years. When Officer Urena asked McMurray to tell him about the person involved in the "incident . . . on Sunday night," McMurray replied, "Let's call him St. Louis for right now . . . . [¶] . . . [¶] . . . [W]e call him St. Louis 'cause he's from St. Louis." McMurray gave the officers a physical description of "St. Louis," and indicated that he "get[s] along with" a man named Charles, who went by the nickname "Moses." McMurray also told the officers that another person known as "Old Man" had said that the murder was "over a bag of weed," and that "a white guy" known as "Mike" had "big knives for sell" [*sic*] during the week leading to the murder.

On April 20, 2005 (the day after McMurray's first interview), Officer Urena and another officer saw McMurray in an alley near Beverly Boulevard and Fairfax Avenue. McMurray told the officers that he had seen "St. Louis," who was wearing a black and white Pendleton shirt, at the "[SOVA] Pantry" (a food bank) about 40 minutes earlier. Urena immediately went to the pantry, and talked to the manager, but could not find anyone who went by the name "St. Louis" on the pantry's sign-in list.

LAPD Detective Ronald Cade also worked the Gelman murder investigation. On April 20, 2005 (after McMurray had talked to Officer Urena), Cade and Urena interviewed McMurray at the police station. During the interview, McMurray stated that "Moses" had made comments tying "St. Louis" to the murder. According to McMurray, "Moses" had said that he and "St. Louis" had gone to "connect," and that "[St. Louis] ended up stabbing [the guy]." "Moses" had said that he and "St. Louis" had not gotten

any money, but "St. Louis" did "get a baggie of weed." "Moses" had also said that "the dude" (apparently referring to "St. Louis") had stabbed this "white boy that was trying to take [the] weed from him." Later in the interview, McMurray said that it was someone named "Dave" who said the murder was "over the weed."

On April 21, 2005, Officer Urena received information that "St. Louis" might be a man named Carl Neil Wilson. After receiving the information, Urena obtained a photograph of Wilson, and then found McMurray in an alley near the murder scene, and showed him the photograph. McMurray said that the photograph looked like "St. Louis," but he was not sure.

On July 27, 2005, Officer Urena interviewed McMurray again after he had been arrested on an unrelated matter. During that interview, McMurray again maintained that he had heard that "St. Louis did the stabbing." More specifically, McMurray stated that he had heard that "St. Louis" was "doing a weed buy with the guy," but it "went bad." McMurray said that it was "supposed to be a weed buy," but he thought it was really a "robbery [that] got out of hand." McMurray said that "St. Louis" could not "handle the dude," and "stabbed him in the neck."

On November 16, 2005, Officer Urena received information from Officer Eddie Morales that McMurray had, on a date not specifically stated in the record, identified a person who was known as "CJ" as a suspect in the Gelman murder. On a date or dates not certain in the record, Morales took a series of photographs of "CJ" — at some point identified as Wayne Calhoun — and had given the photographs to Officer Urena. After receiving the information from Morales, Urena went looking for McMurray to ask him whether he had any information about "CJ." Urena found McMurray in an alley, and McMurray told him that "CJ" might be found at Blessed Sacrament Church in Hollywood. After talking to McMurray, Officer Urena went to the church facility and spoke to "CJ."

On November 18, 2005, McMurray telephoned Officer Urena, and said he wanted to speak to the detectives "in order to clear his conscience." Urena and Detective Cade met with McMurray at a hot dog restaurant, where McMurray said that he had been present in the adjacent alley at the time of the Gelman murder. McMurray said he had observed the victim "twitching" on the ground, and that the suspect, whom he referred to as "CJ," had crossed McMurray's path in the alley, with a "look of surprise or shock in his face." McMurray stated that he had seen "CJ" in Pan Pacific Park a few hours later, and that "CJ" had said, "All the wood had to do was give me the weed. Then I wouldn't have had to stick him." Urena then showed McMurray an array with four of the photographs of Wayne Calhoun taken by Officer Morales, and McMurray then identified Calhoun, writing on the array, "This is the person that told me that he killed a man . . . ."

On December 1, 2005, McMurray was interviewed at the Wilshire Division police station by Detective Holguin and Officer Urena. During this interview, McMurray said that he had been near the mouth of an alley at the time of the murder, and had seen a man coming out of the dumpster area. McMurray said that he had tried to talk to the man, but the man just kept walking and looked like he was in "shock." After the man passed, McMurray went to the mouth of the alley, where he saw Gelman on the ground and saw blood. McMurray immediately "got out of there" and went back to Pan Pacific Park. McMurray stated that "St. Louis" was the man who had passed McMurray in the alley, and that "St. Louis" had told "Moses" that "all [the] dude had to do was give it up." McMurray said he asked "St. Louis" what he was talking about, and that "St. Louis" had pulled out a bag of weed.

A moment later in the interview, McMurray stated that he did not mean to say that "St. Louis" was the murder suspect. McMurray explained that, a couple of days before the murder, "St. Louis" had "jumped" a man in back of the 7-Eleven, and that "St. Louis" also had a problem with a man in the alley on Fairfax Avenue, and that was the reason McMurray had been thinking about "St. Louis." McMurray then added that the "real" suspect had been hanging out in Griffith Park and had recently returned to the Pan Pacific Park area. McMurray said that the man also slept near the Hollywood Bowl, and that he

kept a miniature machete in a roll that was on his handlebars so it was easily accessible. When Officer Urena began to ask McMurray about seeing Gelman on the ground, McMurray said that he may have gotten blood on his clothing because the man who went past him had either "shook [his] hand" or "rubbed" against him.

The Cisneros Interview

John Cisneros first came forward to talk to the police about the Gelman murder on December 15, 2005. Cisneros had not talked to the police earlier because he was "kind of maybe scared in a way [and] thought maybe [the police] knew about what was going on already, [and] had some . . . witnesses or something like that." Cisneros understood there was a "code" on the street against "telling on people," and understood that, if he was labeled a "snitch" or a "rat," he might be "hurt . . . with violence."[4]

The December 20, 2005 Interview of McMurray

On December 20, 2005, Detective Cade and Officer Urena interviewed McMurray again. During this interview, McMurray said he thought that there might be blood on the left forearm of his hooded sweater because he had been "giving tap as [the suspect] was leaving" the scene of the murder. After the interview, the officers went with McMurray to the southeast corner of a Volvo dealership where he supposedly kept his belongings in a container, but could not locate the sweater.

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4 At the time of McMurray's third trial, Cisneros was in custody. During his testimony, Cisneros described an encounter with McMurray while they were in the lines of inmates being transported to the courthouse. McMurray had said, "There goes that mother-fucker bitch right there," and reached out to hit Cisneros. Later the same day, after Cisneros testified, McMurray saw Cisneros being taken to his housing unit, and said, "That is what a rat looks like. I'm going to get you when I see you." McMurray pointed Cisneros out to other inmates in his cell. On the way to Cisneros's second day of testimony, a similar incident occurred. McMurray spotted Cisneros in the line and yelled out, "Hey, bitch, I'm going to get you on the street."

Malone's Identification of McMurray as the Assailant

Later on December 20, 2005, Detective Holguin showed eyewitness Malone a photographic six-pack which contained McMurray's photograph. Malone selected McMurray's photograph, writing: "Number 3 looks most like the components I helped create, and parenthetically, my memory of the person is largely synonymous with the composite."[5]

The Final Interview of McMurray

On December 27, 2005, Officer Urena returned to Pan Pacific Park to interview McMurray again, "to do a follow-up to see if [they] could come up with [his] sweater." McMurray agreed to be interviewed at the police station, but said he had not been able to find his sweater yet. At the police station, McMurray agreed that he had previously told the detectives that he was in the alley the night of the murder, and that he did not see it happen, but that he saw someone pass by him as he was coming out of the alley. McMurray then expanded on his previous interviews, explaining that, prior to seeing the suspect pass by, he had been shooting up "dope" in the alley with Jimmy "Little Jimmy" Altman, near a dumpster between the vitamin shop and the bagel bakery. McMurray said that he saw Wayne Calhoun in the alley and said, "What's up, bro?" According to McMurray, Calhoun replied by saying something to the effect that "all the boy had [to] do was give it up." McMurray said that he had noticed blood on Calhoun's clothing, and that they "tapped forearms" as a greeting, and McMurray felt some moisture, but did not think anything of it at the time.

McMurray also told the police that, prior to shooting up, he heard a car door shut and saw Gelman walking by himself, probably walking from a car. McMurray said that he was then behind the dumpster for 15 or 30 minutes, crushing the dope and mixing it up. McMurray said that Gelman "didn't do no yelling" and that he "went out like a soldier." McMurray told the police that Calhoun was the person who he saw in the alley

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5 At trial, Malone identified McMurray as the man he had seen standing face-to-face with Gelman, and confirmed that he had also identified McMurray at a prior court hearing.

and who said something to the effect that "the white boy — or the boy should have just gave it up." McMurray also said he had gotten blood on his hands and washed it off in the park bathroom. McMurray denied that he had knocked on any door on the night of the murder, or that he had asked anyone for a change of clothes.

The Criminal Case

In September 2006, the People filed an information charging McMurray with one count of murder, with an allegation that he personally used a deadly weapon, a knife, in the commission the offense.[6] In March 2007, a jury deadlocked 11-to-1 in favor of finding McMurray guilty. In June 2007, a second jury deadlocked 8-to-4 in favor of finding McMurray not guilty.

At a third jury trial in August and September 2007, the prosecution presented evidence establishing the facts summarized above. McMurray's defense consisted of expert testimony on police procedures (criticizing the investigation of the Gelman case), and expert testimony on "eyewitness psychology" (challenging eyewitness Malone's identification), and an alibi witness who testified that he was in Pan Pacific Park with McMurray shortly before he had heard helicopters searching for the murderer.

On September 7, 2007, the jury returned a verdict finding McMurray guilty of second degree murder, with a finding that he personally used a deadly weapon, a knife.

DISCUSSION

I. The Trial Court's Evidentiary Rulings Excluding Evidence About a Meeting With the Deputy District Attorney and Limiting Examination About the Collection of Evidence Were Appropriate

During trial, McMurray proffered evidence which he asserted would tend to show that a prosecutor in the district attorney's office had pressured the investigating police officers "to arrest someone" for the Gelman murder. McMurray also proffered evidence

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[6] The information alleged that McMurray had suffered six prior convictions for which he had served a prison term. Those allegations are not at issue in the current appeal.

which he asserted would show that the police were deceptive and/or incompetent in the course of their investigation. Taken all together, McMurray maintained that the evidence would support an inference that he had been wrongly arrested for the murder. With that trial context in place, McMurray contends on appeal that his murder conviction must be reversed because the trial court wrongly excluded evidence regarding (1) a meeting in December 2005 between the prosecutor and the investigating officers, and (2) alleged problems with the collection of evidence at the crime scene. McMurray contends the excluded evidence "was key to [his] defense," and that its exclusion caused the jury to find him guilty. McMurray's arguments do not persuade us to reverse his murder conviction.

A. The Meeting

1. The Trial Court's Ruling

During a last minute conference prior to the start of the third trial, McMurray's defense counsel addressed the issue of whether the trial court was going to allow him to introduce evidence regarding a December 2005 meeting between a "Ms. Wilkenson" of the district attorney's office and the investigating police officers. This is the exchange addressing that issue:

> "[DEFENSE COUNSEL]: With respect to that, the meeting that was held on December [19, 2005,] immediately preceded what . . . the defense believes [was] a suggestive lineup [with] Mr. McMurray's photograph in it. [¶] The . . . the statements attributed to Ms. Wilkenson, to me, would indicate that there is a direct link between [her] statements and the [six-pack] lineup . . . that was presented to the witness Malone, that being that you need to have an identification by the eyewitness and get a confession if you can. [¶] [Ms. Wilkenson's] statements, in light of the lineup that was presented, and it was Mr. Malone himself that brought attention to the fact that Mr. McMurray's photograph was of a different color than all of the others, and he questioned the detectives about it. [¶] The conduct of the detectives in composing that lineup was to get what Ms. Wilkenson told them [the prosecution] needed, and that was an identification by the witness. And so the witness's attention was drawn to [Mr. McMurray's photograph], and our position is purposely to that photograph by the nature of the lineup that was presented. [¶] With respect to the confession, the court will recall [Officer] Urena's testimony [that] the

purpose of that December 27th meeting [with Mr. McMurray], the purpose was to extract -- this is the defense's opinion -- to extract a confession if they could, and they didn't get it. But in other words, they were following up on what Deputy D.A. Wilkenson told them [the prosecution] needed. [¶] So I would ask the court to reconsider and permit the defense to put in that evidence.

"THE COURT: People.

"[THE PROSECUTOR]: I think it was argued at the previous trial, and the court was absolutely right in its ruling. The fact that a D.A. may have suggested to officers prior to filing, hey, you may want to do this, and they are seeking advice from the D.A., what else would you like . . . [us to] do -- I don't even know if they actually brought [the case] in at that point trying to get it filed or they were just trying to get advice. [¶] I myself have helped I don't know how many homicide detectives over the years, prefiling in giving advice -- you should probably do this, you should probably do that. Not that the case isn't filable [*sic*] at the time, but, hey, it wouldn't hurt because they come in and ask for advice all the time. [¶] The fact that our office asked detectives to go out there and suggested they do something is absolutely irrelevant to these proceedings. [¶] [Defense counsel] Trotter [will have] every opportunity to cross-examine . . . Detective Urena as to the six pack, any problems that may have existed in the six pack, and can impeach him with that, that for whatever reason a picture may have looked different. But to bring in a Deputy D.A. to -- and she would have to come in and testify at that point as to what she was doing that day. And to have her come in -- and as an offer of proof, I have spoken to her about this. Her feeling was she absolutely believed the defendant was guilty or she wouldn't have filed the case. [¶] It just -- it muddies up the entire proceedings, and it is absolutely irrelevant.

"[DEFENSE COUNSEL]: Well, Your Honor, with respect to what Ms. Wilkenson feels about the guilt or innocence, that is definitely irrelevant. And this is -- my comments are taken directly from the testimony. It wasn't what you may do. The testimony from [Detective] Urena was -- and it is in their chronological log -- get eyewitness -- the eyewitness identification. So that is based on what the testimony has already been. But her feelings are definitely irrelevant.

"THE COURT: All right. Well, the ruling will stand. [¶] There was a fair amount of testimony that was presented last time, as well as offers of proof last time, and additional offers of proof today which I am relying upon, and it continues to be, in my mind, irrelevant. And the additional factor under Evidence Code [section] 352 now is that it would

appear to me that, if it is opened up as to what Deputy [D.A.] Wilkenson may have said, the suggestion being that she said it because the detectives had to gather evidence in order to make the case solid, she would be entitled to explain, no, that wasn't the case, I thought it was solid already, or I thought that there was plenty to establish his guilt. It does seem to me to open up a can of worms that is far from probative and would be confusing and prejudicial. [¶] So the examination of the detective[s] certainly can inquire about the photo display which they prepared, how they prepared it, the appearance, but not as to any meeting with the Deputy District Attorney or any statements made to them by the Deputy District Attorney.

"[DEFENSE COUNSEL]: Your Honor, if I -- If I may, if I remember the court's ruling before, the fact of the meeting was not excluded, it was just the substance of what was in that meeting.

"THE COURT: Well --

"[DEFENSE COUNSEL]: If I remember the court's ruling.

"THE COURT: Well, that is because it had already been presented. But I don't see that the fact of the meeting or the content of the meeting has any difference as to the nature of my ruling. So there will be no testimony as to either."

2. Analysis

McMurray recognizes that a trial court's evidentiary rulings are, as a general rule, reviewed for abuse of discretion (see, e.g., *People v. Benavides* (2005) 35 Cal.4th 69, 90), but he does not aim his arguments on appeal in that direction. Instead, McMurray argues the trial court's evidentiary ruling resulted in a violation of his constitutional due process right to "present a defense." We disagree because the two cases upon which McMurray relies, *DePetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057 (*DePetris*), and *Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164 (*Thomas*), are distinguishable.

In *DePetris*, defendant killed her husband with a shotgun while he slept. At her jury trial on a charge of first degree murder (she was convicted), defendant attempted to present a defense founded on a theory of imperfect self-defense supported by evidence consisting of the victim's handwritten journal, and defendant's testimony that she read the journal shortly before the killing. The journal contained the victim's accounts of his

violent behavior against his first wife and others. The trial court excluded the journal, ruling that it was irrelevant. (*DePetris*, *supra*, 239 F.3d at pp. 1058-1059.) The state Court of Appeal affirmed defendant's conviction, ruling that the trial court erred when it excluded the journal, but finding the error was harmless. The federal district court denied defendant's petition for writ of habeas corpus (on harmless error grounds), but the Ninth Circuit Court of Appeals reversed, ruling that the excluded evidence concerning the victim's journal "went to the heart of the defense." (*Id*. at p. 1062.)

We find the circumstances in McMurray's current case to be markedly different from those found in *DePetris*. The "heart" of McMurray's defense at trial was his claim that the case against him was built upon a foundation of a deceptive and/or incompetent police investigation, including the faulty collection of evidence at the crime scene and an eyewitness identification of McMurray that was tainted by a suggestive pretrial photo array. The trial court's ruling to exclude evidence regarding the December 2005 meeting between Ms. Wilkenson and the investigating officers did not undermine the "heart" of McMurray's chosen defense. On the contrary, the trial court permitted McMurray to elicit testimony from Detective Holguin showing the problems with the collection of evidence at the crime scene, and permitted McMurray to present expert testimony from Mr. Williams highlighting the problems with the police investigation. We are satisfied that the trial court's control over the remaining proffered evidence at trial did not result in a denial of McMurray's constitutional right to present a defense. Absent the exclusion of case-affecting, material evidence, a trial court's rulings under Evidence Code section 352 do not violate a defendant's constitutional due process right to present a defense as set forth in *Chambers v. Mississippi* (1973) 410 U.S. 284 and similar cases. On the contrary, it is well-established that a defendant does not have a constitutional right "to present all relevant evidence in his favor" regardless of how limited in probative value the evidence will be. (See, e.g., *People v. Babbitt* (1988) 45 Cal.3d 660, 684.)

In McMurray's present case, the probative value in the evidence showing that the prosecutor "pressured" the investigating officers was tangential and minimal, and it was heavily counter-balanced by the potential for confusion and undue waste of time delving

into the prosecutor's actual words and her mind-set and thought processes. The material issue, which McMurray was permitted to explore in his defense case, was the scope and substance of the police investigation itself.

McMurray's reliance on *Thomas* does not convince us to reach a different result. In *Thomas*, defendant was convicted of first degree murder arising from a stabbing in the parking lot of an apartment building. The police "never located the murder weapon and had no physical evidence linking [defendant] to the crime," (*Thomas*, *supra*, 273 F.3d at p. 1168), and the prosecution's case at trial "was based almost entirely on the eyewitness testimony of a single accusing witness [(Schwab)] who himself had the opportunity and a possible motive to commit the offense . . . ." (*Ibid.*) On review of the district court's denial of a petition for writ of habeas corpus, the Ninth Circuit Court of Appeals ruled that the "cumulative effect of [three significant trial] errors . . . require[d] the issuance of the writ." (*Id*. at p. 1181.) One of those errors was the trial court's decision to "cut off all inquiry" regarding the investigating police officer's difficulty in locating Schwab for two months after the murder took place. (*Id*. at p. 1176.) In other words, we read the *Thomas* opinion to fault the trial court, in part, for disallowing a line of questioning which may have supported an inference that Schwab had fled and/or gone into hiding after the murder, thus showing his own consciousness of guilt for the crime.

The circumstances described in *Thomas* are well-removed from the circumstances in McMurray's current case. As noted above, the trial court's ruling to exclude evidence of the meeting between Ms. Wilkenson and the investigating officers did not undermine McMurray's chosen defense. As it was with *DePetris*, the applicability of *Thomas* is a matter of degree, and we simply do not find McMurray's case to fall over onto the side of the fence of an unfair trial.

B. The Collection of Evidence

1. The Trial Court's (Three) Rulings Challenged on Appeal

As part of his defense case, McMurray proposed to call Timothy Williams as an expert witness to testify regarding the collection of evidence at the crime scene, or, more accurately, to testify regarding the investigating officers' failure to collect evidence at the

crime scene. At a conference in the midst of trial, before the start of testimony on August 28, 2007, the trial court, the prosecutor, and defense counsel discussed the issue outside the presence of the jury. The prosecutor objected that the proposed expert testimony would amount to no more than a generalized opinion that the investigation should have been "done . . . differently." McMurray's counsel argued that the testimony would call into question the investigating officers' credibility by highlighting their failure to collect a key piece of evidence — the bloodied, crumpled piece of newspaper that had been stuffed around Gelman's neck area when he was found.

After listening to the lawyers' arguments, the trial court denied the prosecutor's "motion to exclude" McMurray's expert testimony, ruling that McMurray was "entitled to present [his] defense regarding the [police officers'] failure to retain evidence that [he] and [his] expert believe[d] to be material." At the same time, however, the court expressed its "frustration" that evidence had already been presented on the subject of the shortcomings of the police investigation, and stated that it remained "prepared to exclude the cumulative evidence." Following further argument, the court laid out its final ground rules on the subject of the police investigation at the crime scene:

> "The ruling is that [the defense] may call Mr. Williams as an expert to testify about police practices and to give his expert opinion regarding the procedures for [the] appropriate handling of evidence based upon the L.A. Police Department Manual. [¶] But as for calling Detective Cade and Detective Holroyd to go into the same areas that have already been brought out from Detective Holguin and that will be further explained by Mr. Williams is foreclosed under Evidence Code [section] 352."

A moment later, Mr. Williams began testifying. Shortly into direct examination, McMurray's counsel questioned Mr. Williams about the LAPD's practice of preparing a "60-day progress report" on a homicide investigation, and Williams explained that such report "talks about the investigation that was done[,] talks about any leads that were found . . . [,] talks about results of forensic work that was done during that 60-day period [and, t]hen at the conclusion of th[e] report it outlines things to be done."

McMurray's counsel then asked, "Would that report, if it is properly done, include anything that is made up by the person that is completing the report?" and the prosecutor objected that it was an "improper hypothetical" because there were no facts in evidence showing that any information in the 60-day report in the Gelman murder investigation was made up. At a sidebar conference, McMurray's counsel argued that Detective Cade had testified during one of the earlier trials that he had "made up" the listed weight for the suspect ("160 to 180" pounds). The prosecutor argued that Cade had not admitted to making up facts in his report, and that the detective's prior testimony could more accurately be described as showing that he had used a "weight range" in his report because he did not have an exact weight description. The prosecutor further argued that any evidence showing what Cade had or had not recorded about the suspect's weight was "tangential" and did not "impeach any evidence" in the case. The trial court sustained the prosecutor's objection.

Later during the defense case, McMurray's counsel called Detective Christine Holroyd to testify regarding her investigation on the morning she responded to the crime scene. On direct examination, defense counsel asked, "Now, are there any guidelines or procedures that are supposed to be used in collecting bloody evidence?" The prosecutor objected, and the trial court sustained the objection, noting that it had already ruled on the subject ("We had a hearing on that.") At a sidebar conference, McMurray's counsel argued that he wanted to inquire about who had or had not been involved in the actual collection of evidence, particularly focusing on the failure to take the bloody newspaper into evidence. The trial court was not swayed: "My ruling is that you have [already] gone into that with the testimony of Detective Holguin and with the expert testimony of Mr. Williams, and there is no reason to duplicate that with Ho[l]royd, Cade or others."

A moment later, McMurray's counsel asked Detective Holroyd how often reports are done in the course of a homicide investigation. Again the prosecutor objected as "cumulative," and, again, the trial court sustained the objection. In the next breath, McMurray's counsel asked Detective Holroyd whether she had signed the 60-day report in the Gelman investigation, and the detective answered, "[Y]es." Defense counsel then

asked, "And before you signed it, did you check it for accuracy?" Again, the prosecutor objected as "cumulative," and, again, the trial court sustained the objection. Defense counsel then asked the detective about the description of the suspect that she had recorded in her "P.I.R. report," specifically asking, "Where did you get the description of the suspect?" The prosecutor objected that the line of inquiry into the information in the detective's report was "irrelevant" because it was "an internal report." The trial court sustained the objection.

McMurray's counsel also called Detective Cade to testify regarding his part in the Gelman murder investigation. On direct examination, defense counsel asked, "What is the purpose of writing reports when you do a crime investigation?" The prosecutor objected that the question was irrelevant, and the trial court sustained the objection.

2. Analysis

McMurray contends the trial court's evidentiary rulings limiting his examinations of Williams, Holroyd, and Cade violated his constitutional right to present a defense. For much the same reasons as we explained above, we disagree. The trial court's evidentiary rulings did not, in our view, result in a denial of McMurray's ability to present his chosen defense. McMurray's fundamental attack on the police investigation comes through the pages of the trial transcript clearly and strongly, and the trial court's attempts to keep a rein on the trial did not implicate constitutional protections.

C. Prejudice

Finally, even assuming the trial court was overzealously concerned with protecting against "cumulative" and/or "irrelevant" evidence, we are not convinced under any standard of review (compare *Chapman v. California* (1967) 386 U.S. 18, 24 with *People v. Watson* (1956) 46 Cal.2d 818, 836) that McMurray was prejudiced by the court's evidentiary rulings which he challenges on appeal. The case against McMurray was not as weak as the three trials may tend to suggest. The evidence showed that McMurray "bedded down" within a few block radius of the murder scene, and he expressly admitted during the course of his various interviews that he was close enough to the actual murder itself to have seen the victim "twitching" on the ground, and to see a "suspect" leaving

the scene. McMurray stated that he had gotten blood on his clothing. An eyewitness identified McMurray from a pretrial photo array and at trial, and another witness testified that McMurray had needed money a short period of time before the murder (he had been denied "credit" for "meth") and had made a statement about stabbing someone at about the same time police and paramedics were arriving on the murder scene. McMurray's numerous attempts point the blame at "St. Louis" and, later, at "CJ," tend, in our view, to show a consciousness of guilt at a minimum. We are satisfied that, had the trial court allowed every one of McMurray's inquiries to be pursued, the result of his trial would not have been different.

II. The Trial Court Properly Excluded Two Photographs

McMurray contends his murder conviction must be reversed because the trial court wrongly precluded him from introducing an array of six photographs of Wayne Calhoun. An array of four of the photographs was admitted, but a photograph of a knife found in Calhoun's possession, which was part of the full set of six photographs, was not allowed. Particularly focusing on the photograph of the knife found in Calhoun's possession, McMurray argues that this proffered evidence supported his "third party culpability" defense, and that its exclusion violated his right to present a defense. We disagree.

A. The Trial Court's Ruling

At a conference before the start of testimony on August 28, 2005, in the midst of trial, McMurray's counsel again raised the issue of calling Detectives Holroyd and Cade to testify regarding their conduct during the investigation. The trial court laid out its ruling -- that it would not permit the defense to present "duplicate" evidence regarding the problems with the police investigation. That conference included a discussion regarding McMurray's expert on police procedures, and the trial court ruling to allow the expert to testify. Just prior to the expert's testimony, the following exchange took place regarding a particular piece of evidence involved in the police investigation, i.e., the photographs of Wayne Calhoun and the knife recovered from Calhoun:

"[DEFENSE COUNSEL]: . . . [¶] One other issue. With respect to the photograph of [Wayne] Calhoun . . . , one involving, the knife . . . . [¶] . . . [¶] With respect to the knife, it corroborates part of Mr. McMurray's statement [in one of his interviews] that the person [who committed the murder] carried a knife and carried it -- well, carried a couple of knives, one of them being in a sheath. And on this picture, that is what is shown. So it is relevant in terms of corroboration of the statement of Mr. McMurray.

"THE COURT: People.

"[THE PROSECUTOR]: Mr. McMurray said that everybody out there carried knives. There is no real relevance as to this picture. . . . [¶] . . . [¶] It's third party culpability. And now they want to introduce a knife that was recovered off [Wayne Calhoun] to somehow corroborate the defendant's own statement. It's absolutely [Evidence Code section] 352. There is no probative value whatsoever, and it is absolutely prejudicial.

"THE COURT: We are talking about exhibit JJ in the earlier proceeding, which was the photograph of Calhoun that is exhibit 73 plus the additional photograph of the knife?

"[THE PROSECUTOR]: Correct.

"[DEFENSE COUNSEL]: Exhibit JJ.

"THE COURT: Yes, the objection is sustained.

"[DEFENSE COUNSEL]: On what grounds, Your Honor?

"THE COURT: There is no showing of any relationship to the events in this case. . . . I don't know that there was ever any true testimony as to the circumstances of the photograph being taken. But even assuming the explanation is that on that particular day, they — they located and detained Mr. Calhoun and took a photograph of him with a knife, it has no relationship to the events in this case.

"[DEFENSE COUNSEL]: Except that it corroborates Mr. McMurray's statement about him carrying a knife.

"THE COURT: The objection is sustained.

"[DEFENSE COUNSEL]: And the basis is no relevancy.

"THE COURT: I have explained my ruling."

B. Analysis

A trial court is not required to allow any evidence, no matter how remote, to be admitted to show that a third party may have committed an offense for which a defendant is on trial. (*People v. Hall* (1986) 41 Cal.3d 826, 833.) On the contrary, evidence of third party culpability is not admissible unless it shows a "direct or circumstantial link[]" between the third party and the actual perpetration of the crime. (*Ibid*.) A trial court's ruling to exclude evidence of third party culpability is reviewed for abuse of discretion. (*People v. Lewis* (2001) 26 Cal.4th 334, 372-373.) Again, McMurray frames his argument in a different direction, arguing that the exclusion of the Calhoun photographs, and, in particular, the photograph of the knife he had been carrying, resulted in a denial of his right to present a defense. We disagree.

McMurray's defense at trial extensively explored and highlighted his third party culpability theory. McMurray's various accusations against others — leveled during the course of his several interviews with police — were presented to the jury, as was his alibi defense, which implicitly pointed to another person as the killer. Against this backdrop, the trial court did not deny him the right to present a defense by excluding the Calhoun photographs. This is particularly true where the photographs did not show a meaningful link between Calhoun and the Gelman murder. For one thing, any knife which may have been found in Calhoun's possession on an unknown date after the Gelman murder could not possibly have been used in the murder because the knife which actually was used in the murder was found embedded in his neck. The fact that Calhoun was found with a knife after the Gelman murder does not show a "direct or circumstantial" link between him and the murder. To the extent that McMurray argues the photograph tended to buttress his own accusations against Calhoun, we simply are not convinced that the trial court's evidentiary ruling resulted in a denial of McMurray's right to a meaningful opportunity to present a defense. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 324-331; see also *California v. Trombetta* (1984) 467 U.S. 479, 485.)

C. Prejudice

Finally, assuming the trial court erred by excluding the Calhoun photographs, we are not convinced under any standard of review (compare *Chapman v. California*, *supra*, 386 U.S. at p. 24 with *People v. Watson*, *supra*, 46 Cal.2d at p. 836) that McMurray was prejudiced by the court's evidentiary rulings. As we explained above, we decline to view the case against McMurray as particularly weak, and any tangential benefit that may have been derived from buttressing McMurray's own self-serving accusations against Calhoun was outweighed by the evidence of McMurray's guilt.

III. There Was No Cumulative Error

For the reasons explained above, which we incorporate here, we reject McMurray's argument that the cumulative effect of the errors discussed in the previous parts of this opinion mandates reversal of his conviction. We see no discrete error, and, hence, no cumulative error.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BIGELOW, J.

We concur:

RUBIN, Acting P. J.

BAUER, J.*

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.